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January 31, 2011

VIA Electronic Submission
Surface Transportation Board
Docket No. EP_704_0
395 E Street, S.W.
Washington, D.C. 20423-0001
(www.stb.gov)
Review of Commodity, Boxcar, and TOFC/COFC Exemptions

228725

Re: Comments on review of certain categorical exemptions from regulation under 49 U.S.C. § 10502, specifically the commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14, and trailer-on-flatcar/container-on-flatcar (TOFC/COFC) exemptions under 49 C.F.R. pt. 1090.

To Whom It May Concern:

This letter of intent is to confirm our interest to participate in the public hearing on February 24, 2011 held by the Surface Transportation Board regarding the review of commodity, boxcar, and TOFC/COFC exemptions.

Holcim (US) Inc. Supply Chain and Logistics Manager Mike Eischer, representing one of the largest cement producers in the U.S., will participate by providing the enclosed testimony related to this exemption.

Holcim (US) appreciates the opportunity to provide comments on the important questions related to this exemptions review. Holcim (US) looks forward to working with the Board as it continues to consider these issues. Please do not hesitate to contact us should you have any questions regarding our perspective on this matter.

Sincerely,

Erika Guerra
Government Affairs Manager
erika.guerra@holcim.com

.cc Mike Eischer, Holcim (US) Inc

TESTIMONY BEFORE THE

SURFACE TRANSPORTATION BOARD

SUBMITTED BY:

HOLCIM (US) INC.

HEARING ON:

THE REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS UNDER 49 U.S.C. § 10502, SPECIFICALLY THE COMMODITY EXEMPTIONS UNDER 49 C.F.R. §§ 1039.10 AND 1039.11, THE BOXCAR EXEMPTIONS UNDER 49 C.F.R. § 1039.14, AND TRAILER-ON-FLATCAR/CONTAINER-ON-FLATCAR (TOFC/COFC) EXEMPTIONS UNDER 49 C.F.R. PT. 1090. STB Docket No. EP 704

January 31, 2011

Holcim (US) Inc. ("Holcim (US)") respectfully submits comments on the Surface Transportation Board's review of certain categorical exemptions from regulation under 49 U.S.C. § 10502, specifically the commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14, and trailer-on-flatcar/container-on-flatcar (TOFC/COFC) exemptions under 49 C.F.R. pt. 1090.

Holcim (US) is a leader in the domestic cement industry, producing and supplying more than 13.5 million tons of cement and cementitious products annually. More than 2,500 Holcim employees generate over $1.5 billion in annual revenue. Over the last five years, we have invested in excess of $2 billion to upgrade and expand our U.S. facilities, including a significant investment in our new plant in St. Genevieve County near St. Louis, Missouri.

Holcim serves customers in 44 states through a network of 15 production facilities and 63 distribution terminals. Roughly 6.5 million tons of cement moves from our manufacturing facilities to these terminals for final distribution to customers; 40 percent of that volume moves by rail. Additionally, Holcim relies on rail for the delivery of critical raw materials and energy feedstocks to our manufacturing facilities to feed their continuous operations.

Our parent company, Holcim Ltd., is a global leader in the building materials sector, supplying over 150 million tons of cement and almost 200 million tons of aggregates annually in more than 70 countries. Holcim is considered a leader in sustainable development and for the last five years has been recognized as the "Leader of Industry" by the Dow Jones Sustainability Index for the building materials sector. Holcim seeks to minimize the environmental and public health impact of its operations, and views its commitment to sustainable development as instrumental to its future prosperity. Occupational health and safety is a top priority for Holcim. As such, the utilization of safe and eco-efficient transportation options is central to our business success and to ensuring the safety of our employees, contractors, and visitors to our operations.

Dire financial situation facilitated deregulation

Congress enacted the Railroad Revitalization and Regulatory Reform Act in 1976 and the Staggers Act in 1980 in an effort to revitalize a struggling railroad industry. Long subject to tight regulation by the Interstate Commerce Commission (ICC), Congress reduced the Commission's oversight of railroads to ease the regulatory burden and associated economic costs. Nevertheless, protections remained in place for shippers that had no effective competitive alternatives.

Today, the ICC's successor, the Surface Transportation Board (STB), has authority over rail rates where there is no effective competition from other railroads or from other modes of transportation. Additionally, the STB oversees various aspects of rail service and practices to insure the timely delivery of the nation's goods. However, the agency has the authority to exempt a person, a class of persons, or a transaction or service from protections of the statute. Railroad activities can be exempted when it is found that regulation is not necessary to carry out the national rail transportation policy, and either: (1) the exemption is of limited scope; or

(2) regulation is not necessary to protect shippers from the abuse of market power. As a result, a significant number of commodities shipped via rail have been exempted from the protections of federal law, including materials used in the manufacture of cement in 1993 and hydraulic cement in 1995.

The rationale for these decisions was twofold. First, the agency determined that an exemption from federal regulatory requirements would provide certain benefits in the rail transportation marketplace. Second, the agency perceived that many of the commodities selected for exemption had competitive transportation alternatives that rendered protection under federal law unnecessary. Vigorous intramodal and intermodal competition as well as tangible benefits from exemptions in the form of decreased administrative burdens and their associated costs may have justified the broad grant of exemptions in the past. However, much has changed – both in the law and in the rail transportation marketplace – in the two decades since many of these exemptions were imposed, undermining the rationale for such exemptions. Given the circumstances, the revocation of some exemptions is warranted. This is particularly pronounced for the cement sector, which has become increasingly dependent upon rail transportation and needs fair and reasonable rail rates and practices to survive in today's global marketplace.

Rationale for exemptions no longer valid

A wide variety of changes in both law and marketplace has eliminated the basis and need for many of the exemptions. In 1995, Congress passed the ICC Termination Act in 1995, providing wholesale relief from onerous regulatory requirements. As part of that Act, the statute was changed to remove, for all shippers, a variety of regulatory requirements applicable to rail carriers. With the elimination of these "paperwork" burdens, rail carriers enjoyed lower transaction costs regardless of material shipped. Therefore, the cost savings resulting from a reduction in administrative requirements no longer required the agency to grant an exemption, undermining the need for such a designation.

Perhaps most notably, the transportation marketplace has changed considerably, limiting competitive transport alternatives for exempted commodities. Significant consolidation has taken place within the industry, affording rail carriers far more market power now than when the exemptions from the protections of the statute were entered. Holcim (US) relies on the class 1 railroads to deliver raw materials and ship finished product. Only 3 of the 11 Holcim (US) production facilities are serviced by more than one class 1 railroad. However, the potential for competition at these 3 facilities is negated by the fact that all of our receiving terminals are single served. Absent the need to be competitive with each other, the railroads hold enormous pricing power over Holcim (US) due to multiple factors: long distances between origin and destination, we ship bulk materials, large volumes of bulk material, terminal infrastructure, location and geography. The railroads are the only viable option for Holcim (US) to maintain a meaningful presence in many North American markets. The STB only has jurisdiction over business that is <u>not</u> under contract so Holcim has no bargaining power and no authoritative body to turn to for assistance.

Revocation of cement-related exemptions warranted

With no competitive options, no federal protection, and a passive government agency that is failing to provide effective oversight, shippers of exempted commodities face unrestrained shipping costs and unreliable service, and are ultimately put at a competitive disadvantage. As such, Holcim (US) supports the revocation of the statutory exemption provisions. Substantial changes in the competitive landscape and the railroad industry have occurred that call into question the relevance and/or necessity of some of the existing commodity exemptions. Unless these exemptions are revoked, shippers of these commodities cannot seek agency protection for the imposition of unreasonably high rail rates. Such exemptions also prohibit shippers of these commodities from raising concerns about a rail carrier's refusal to provide service on reasonable request, or from contesting various unreasonable practices in which a rail carrier might engage. Revocation of the exemptions would permit a shipper of these commodities to protect itself from these and other abuses of market power by rail carriers. The agency must address the plight of captive shippers of exempted commodities, for the Staggers Act not only directed the agency to pursue exemptions aggressively, but also instructed it to correct any problems arising as a result of the exemption through its revocation authority. To that end, Holcim (US) respectfully requests that the commodity exemptions on hydraulic cement and the materials used in the manufacture of cement be revoked.

Conclusion

Holcim (US) applauds the STB for undertaking this review of certain categorical exemptions from regulation under 49 U.S.C. § 10502. This is an important endeavor, as much has changed – both in the law and in the transportation marketplace – in the two decades since many of these exemptions were imposed. Not only is the basis for these exemptions (i.e. a rail industry in dire financial straits) non-existent, but the rationale for determining what railroad activities are to be exempted has been undermined. As such, many of these exemptions have been rendered irrelevant, and it now upon the STB, in accordance with the authority conferred to it under the Staggers Act, to revoke these exemptions.